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IN THE

Supreme Court of The United States

OCTOBER TERM, 1990

JANE BRAY, et al.,

Petitioners,

v.

ALEXANDRIA WOMEN'S HEALTH CLINIC, et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF AMICI CURIAE OF THE RUTHERFORD INSTITUTE AND THE RUTHERFORD INSTITUTE OF CONNECTICUT IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	ii
INTEREST OF AMICI CURIAE	1
STATEMENT OF FACTS	3
SUMMARY OF ARGUMENT	3
ARGUMENT	4
I. The Petitioners' sit-in demonstrations at abortion facilities do not implicate the constitutional Right to Interstate Travel	4
II. The Right to Interstate Travel is a wholly insubstantial federal claim depriving the district court of subject matter jurisdiction	10
CONCLUSION	14

TABLE OF AUTHORITIES

TABLE OF CASES **PAGE**

Americana Healthcare Corp. v. Schweiker, 688 F.2d 1072 (7th Cir.), *cert. denied*, 459 U.S. 1202 (1982) 11

Bell v. Hood, 327 U.S. 678 (1946) 3

Bolden v. Alston, 810 F.2d 353 (2d Cir.), *cert. denied*, 484 U.S. 896 (1987) 12

Doe v. Bolton, 410 U.S. 179 (1973) 4

Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59 (1978) 11

Edwards v. California, 314 U.S. 160 (1941) 5

Griffin v. Breckenridge, 403 U.S. 88 (1971) 3, 4, 5, 6, 7, 8

Hagans v. Lavine, 415 U.S. 528 (1974) 11

Holland v. Illinois, 110 S.Ct. 803 (1990) 9

Lechtner v. Brownyard, 679 F.2d 322 (3d Cir. 1982) . . 12

Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974) 5

National Abortion Federation v. Operation Rescue, No. CV 89-1181 (AWT) *slip op.* (C.D. Cal. January 31, 1990), *appeal pending*, No. 90-55199 (9th Cir. argued May 11, 1990) . . . 9

New York State N.O.W. v. Terry, 886 F.2d 1339 (2d Cir. 1989), *cert. denied*, 110 S.Ct. 2206 (1990) 1, 10

Northlake Community Hospital v. United States, 654 F.2d 1234 (7th Cir. 1981) 11, 12

Oneida Indian Nation v. County of Oneida, 414 U.S. 661 (1974) 11

Ridenour v. Andrews Federal Credit Union, 897 F.2d 715 (4th Cir. 1990) 13

Roe v. Operation Rescue, 919 F.2d 857 (3d Cir. 1990) 10

Roe v. Wade, 410 U.S. 113 (1973) 2

Shapiro v. Thompson, 394 U.S. 618 (1969) 5

The Passenger Cases, 7 How. 283 (1849) 5

Town of West Hartford v. Operation Rescue, 915 F.2d 92 (2d Cir. 1990) 12

United Brotherhood of Carpenters and Joiners, Local 610 v. Scott, 463 U.S. 825 (1983) 3, 6, 7, 8, 12

United Mine Workers v. Gibbs, 383 U.S. 715 (1966) . . 10

United States v. Guest, 383 U.S. 745 (1966) 5, 6

Webster v. Reproductive Health Services, 492 U.S. 490 (1989) 2, 10

Williams v. Fear, 179 U.S. 270 (1900) 5

Zobel v. Williams, 457 U.S. 55 (1982) 5

STATUTES AND LEGISLATIVE HISTORY

42 U.S.C. Section 1985(3) (1976 Ed. Supp. V.) . . . . . *passim*

OTHER AUTHORITIES:

Barkan, *Protestors on Trial: Criminal Justice in the Southern Civil Rights and Vietnam Anti-war Movements* (1985) 2

Comment, *The Right to Travel: In Search of a Constitutional Source*, 55 Neb. L. Rev. 117 (1975) 4

Dworkin, R., *A Matter of Principle* (1985) 4

Greenberg, Comment, *The Supreme Court, Civil Rights and Civil Dissonance*, 77 Yale L.J. 1520 (1968) 2

Lambak, *Necessity and International Law: Arguments for the Legality of Civil Disobedience*, 5 Yale L. & Pol'y Rev. 472 (1987). 2

New Perspectives on Human Abortion, Part I, Sec. 2: E. Blechschmidt, M.D., *Human Being from the Very First* (1981) 2

Note, *The Right to Travel - Quest for a Constitutional Source*, 6 Rut. Cam. L.J. 122 (1974) 4

Whitehead, *Civil Disobedience and Operation Rescue: A Historical and Theoretical Analysis*, 48 Wash. & Lee L. Rev. 77 (Winter 1991) 2

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INTEREST OF AMICI CURIAE

This is not and should not be a case about abortion rights. This case does, nevertheless, present important issues concerning the improper application of the constitutional Right to Interstate Travel to suppress civil dissent generally in the United States. The Fourth Circuit has now blindly joined the Second Circuit[1] in an unprecedented and wholly unjustified expansion of the Right to Interstate Travel to apply to sit-in protests which occur at the site of medical facilities where abortions are performed.

This case arises in the context of political action and public protests, including "Operation Rescue" sit-in demonstrations at abortion sites, as a result of the abortion of many millions of unborn children in the United States since 1973. Petitioners believe that human life is precious. The conception and growth of human life within a mother's womb has been scientifically observed, documented

[1] *New York State N.O.W. v. Terry*, 886 F.2d 1339 (2d Cir. 1989), *cert. denied*, 110 S.Ct. 2206 (1990).

and described.[2] However, since *Roe v. Wade*, 410 U.S. 113 (1973), thousands of arrests and prosecutions for trespass and other state law violations in connection with such public protests have occurred nationwide. Hundreds have been arrested in the Washington, D.C., area alone.

The United States experienced similar wrenching social upheaval and political division with the civil rights and Vietnam war protests of previous decades.[3] Since this nation's birth, the evident and powerful result of deeply held beliefs by Americans has been political protest and civil dissent. It is certain that abortion is the most divisive public issue of the last two decades,[4] and perhaps the greatest national political and moral question since slavery.

The Rutherford Institute is concerned that a wholly inappropriate and expansive interpretation of the Right to Interstate Travel threatens to embroil the federal courts in the suppression of all future political protest movements, regardless of ideology. Such cases properly belong in the state courts, which are more than able to deal with uncomplicated state tort law issues such as trespass and nuisance.

Amici Curiae are non-profit religious corporations named for Samuel Rutherford, a 17th-century Scottish divine and Rector at St. Andrew's University. With thirty-five state chapters, three international chapters, and international headquarters in Charlottesville, Virginia, The Rutherford Institute undertakes to assist litigants and to participate in significant cases relating to the freedom of speech of religious persons. Counsel for *amici curiae* have specialized in litigation in state and federal courts and have participated as counsel for

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[2] *New Perspectives on Human Abortion*, Part I, Sec. 2: E., Blechschmidt, M.D., *Human Being from the Very First* (1981).

[3] Lambak, *Necessity and International Law: Arguments for the Legality of Civil Disobedience*, 5 Yale L. & Pol'y Rev. 472, 480-81 (1987); Barkan, *Protestors on Trial: Criminal Justice in the Southern Civil Rights and Vietnam Anti-war Movements* (1985); Comment, *The Supreme Court, Civil Rights and Civil Dissonance*, 77 Yale L.J. 1520 (1968); Whitehead, *Civil Disobedience and Operation Rescue: A Historical and Theoretical Analysis*, 48 Wash. & Lee L. Rev. 77 (Winter 1991).

[4] *Webster v. Reproductive Health Services*, 492 U.S. 490, 109 S. Ct. 3040, 3079 (1989) (Blackmun, J., dissenting and concurring in part).

amici curiae in previous cases before this Court. The Rutherford Institute believes the expertise of its counsel will be of assistance to the Court in this case.

The Rutherford Institute believes that the sole federal claim of the Respondents, 42 U.S.C. Section 1985(3), premised on the Right to Interstate Travel, must be thrust out of federal court, as it is a "wholly insubstantial and frivolous"[5] federal claim, which deprives the district court of subject matter jurisdiction.

STATEMENT OF FACTS

Amici Curiae adopt by reference the statement of facts set forth in Petitioners' Brief filed with this Court.

SUMMARY OF ARGUMENT

The central dispute of this appeal involves 42 U.S.C. Section 1985(3) (1976 ed., Supp. V) [hereinafter "Section 1985(3)"], also known as the Ku Klux Klan Act of 1871.[6] The subject matter is the misapplication of the Right to Interstate Travel to Petitioners' antiabortion sit-in demonstrations. Clear pronouncement by this Court is critical at this time to clarify the boundaries of the constitutional Right to Interstate Travel in a manner that the lower courts cannot. The strongly worded cautions of this Court in *United Brotherhood of Carpenters and Joiners, Local 610 v. Scott*, 463 U.S. 825, 834 (1983) against a transfiguring of Section 1985(3) into a general federal tort law are now being completely ignored by several circuit courts.

The Right to Interstate Travel must not be allowed, through a twisted regime of construction, to be used as a sword to strike against

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[5] *Bell v. Hood*, 327 U.S. 678, 682-683 (1946).

[6] A *prima facie* case for relief under Section 1985(3) must allege at least four necessary elements: (1) a conspiracy; (2) for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the law; (3) an act of furtherance of the conspiracy; (4) whereby a person is either injured in his person or property or deprived of any right or privilege of a citizen of the United States.

United Brotherhood of Carpenters and Joiners, Local 610 v. Scott, 463 U.S. 825, 828-829 (1983) (restating the test first formulated in *Griffin v. Breckenridge*, 403 U.S. 88, 102-03 (1971)).

civil dissent in the United States.[7] If the decision by the court of appeals is affirmed, this Court will not only needlessly overburden the federal system with essentially state law claims, but it will also further signal that such suppression of dissent is now welcomed in the federal courts.

ARGUMENT

I. The Petitioners' sit-in demonstrations at abortion facilities do not implicate the constitutional Right to Interstate Travel.

Relying on a holding from *Doe v. Bolton*, 410 U.S. 179, 200 (1973), that state residency requirements for abortions are inconsistent with the Privileges and Immunities Clause of the Fourth Amendment, together with a brief reference to the right against private discrimination recognized by the Court in *Griffin v. Breckenridge*, 403 U.S. 88, 105-06 (1971), the court of appeals affirmed the district court holding that the Petitioners' sit-in demonstrations have violated the Respondents' constitutional Right to Interstate Travel. (Petition for Writ of Certiorari Appendix at 30a.).

In holding that private demonstrators violate the constitutional Right to Interstate Travel by impeding access to an abortion facility, the court of appeals has gone well beyond the level of constitutional protection that has heretofore been recognized in this Court's decisions.

As a threshold matter, no Right to Interstate Travel case, factually analogous to Petitioners' sit-in demonstrations, exists.[8] The Right to Interstate Travel has been implicated principally in two contexts.[9] It has most commonly been invoked in cases involving differential

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[7] "If we think of civil disobedience in [a] general way. . . we can say something now that we could not have said three decades ago: that Americans accept that civil disobedience has a legitimate if informal place in the political culture of their community." R. Dworkin, *A Matter of Principle* 105 (1985).

[8] *See also* Comment, *The Right to Travel: In Search of a Constitutional Source*, 55 Neb. L. Rev. 117 (1975); Note, *The Right to Travel — Quest for a Constitutional Source*, 6 Rut. Cam. L.J. 122 (1974).

[9] "The Right to Travel has long been accepted . . . In addition to protecting persons against the erection of actual barriers to interstate movement, the Right to

(footnote continued)

treatment among persons of varying duration of state or local residence. *E.g., Memorial Hospital v. Maricopa County*, 415 U.S. 250 (1974) (availability of free medical service dependent upon length of county residence); *Shapiro v. Thompson*, 394 U.S. 618 (1969) (welfare benefits limited to persons dependent upon length of state residence). These cases are of no avail to Respondents in that Petitioners did not seek to differentiate between residents and non-residents seeking an abortion.

The second application concerns actual, physical travel among the states.[10] This Court has in the past recognized a limited right under Section 1985(3) to be free of private (or state) actions which hinder travel on the public highways. *Griffin v. Breckenridge*, 403 U.S. 88, 106 (1971); *United States v. Guest*, 383 U.S. 745, 758 (1966); *Edwards v. California*, 314 U.S. 160 (1941). "Undoubtedly... the right, ordinarily, of free transit from or through the territory of any state is a right secured by the 14th Amendment and by other provisions of the Constitution." *Williams v. Fear*, 179 U.S. 270, 274 (1900). In first recognizing a constitutional Right to Interstate Travel that is protected against private action, this Court stated that:

> [T]he federal commerce power surely encompasses the movement in *interstate commerce* of persons as well as commodities. . .It is also well settled in our decisions that the federal commerce power authorizes Congress to legislate for the protection of individuals from violations of civil rights that impinge on their free movement in *interstate commerce*.

United States v. Guest, 383 U.S. at 758-59 (citations omitted) (emphasis added). *See Brief for Respondents in Opposition to Petition for*

Travel, when applied to residency requirements, protects new residents of a state from being disadvantaged because of their recent migration or from otherwise being treated differently from longer term residents."

Zobel v. Williams, 457 U.S. 55, 60 n.6 (1982).

[10] "For all the great purposes for which the Federal government was formed, we are one people, with one common country. We are all citizens of the United States; and, as members of the same community, must have the right to pass and repass through every part of it without interruption, as freely as in our own States."

The Passenger Cases, 7 How. 283, 492 (1849), *quoted in Shapiro v. Thompson*, 394 U.S. at 630.

Writ of Certiorari, at 14 (quoting *Guest* in support of "[t]he constitutional Right to Travel from one State to another"). Thus, Congress' authority to legislate against private action in this context is dependent upon the effect of such action on interstate movement. While some portion of those who sought to enter the abortion clinic had travelled from another state (although many others did not), the Court has never applied this constitutional provision in a manner even approaching that of the lower courts in this case. Specifically, the Court's prior decisions have defined the contours of a constitutional Right to Interstate Travel in terms of an intent to hinder, and an actual hindrance of, interstate travel, both of which boundaries are breached by Respondents' expansive arguments.

First, this Court has held that the effect of private actions on interstate travel may not be merely incidental. Rather, Respondents have the burden of proving that "the federal right to interstate travel was one of the rights meant to be discriminatorily impaired by the conspiracy." *Griffin*, 403 U.S. at 106; *United Brotherhood of Carpenters and Joiners, Local 610 v. Scott*, 463 U.S. 825, 832-33 (1983) (in *Griffin*, "the conspiracy at issue was actionable because it was aimed at depriving the plaintiff of... the Right to Travel guaranteed by the Federal Constitution"). *See also Guest*, 383 U.S. at 760 (18 U.S.C. Section 241, which is the criminal counterpart of Section 1985(3) regarding violation of Right to Interstate Travel, requires that "the predominant purpose of the conspiracy is to impede or prevent the exercise of the right of interstate travel, or to oppress a person because of his exercise of that right").

In *Griffin v. Breckenridge, supra,* certain whites had forcibly stopped an automobile containing "Negro" citizens on a public highway. One of the Negroes, mistakenly believed to be a civil rights worker, was beaten with a club, while the others were allegedly threatened with death and injury and then beaten themselves. Under this factual situation, after detailed analysis of the legislative history of Section 1985 (3), the Court found that the Right to Interstate Travel was subject to "private" interference as well as "governmental," and thus actionable under Section 1985 (3). *Griffin*, 403 U.S. at 98-106. Reversing the Fifth Circuit's affirmation of the district court dismissal, the Court observed that it was "open to the petitioners to prove at trial that they had been engaging in interstate travel or intended to do so,

that their federal Right to Travel was one of the rights meant to be discriminatorily impaired by the conspiracy." Id. at 106 (emphasis added).

The lower courts' holdings herein, that the Petitioners have violated Respondents' Right to Interstate Travel, are incorrect and unsupported in fact and law. A brief review of the Respondents' claim that Petitioners' sit-in demonstrations are indistinguishable from the actions alleged in *Griffin* shows it to be completely unfounded:

> - *Griffin* involved the act of forcibly blocking travel on a state highway. Rescues occur on public sidewalks in the traditional manner of peaceful civil rights sit-in demonstrations.
>
> - *Griffin* involved detention, the brutal use of deadly force and immediate threats of death and serious injury to halt travel upon a highway. Rescues constitute passive, nonviolent demonstrations to protest the act of abortion at clinics and have nothing to do with free travel on public highways or streets.
>
> - *Griffin* involved violent, *racially class-based animus*, proscribed by law. Rescues involve the intent to nonviolently protest abortion, to protect unborn human life and the mother, which has not been proscribed for purposes of Section 1985(3).
>
> - *Griffin* involved violent, racially based assaults interfering with highway travel and civil rights activity. Rescues involve peaceful First Amendment activity such as display of placards, singing, chanting, counseling and praying, as well as passively blocking the entrance of abortion facilities as a means of protesting the termination of unborn human life.

With respect to the question of racial animus, as related to Section 1985(3) actions, the Court in *Griffin* noted that "the conduct here alleged lies so close to the core of the coverage intended by Congress that it is hard to conceive of wholly private conduct that would come within the statute if this does not." *Id.* at 103. In the later case of *United Brotherhood of Carpenters and Joiners, Local 610 v.*

Scott, 463 U.S. 825, 836, dealing with alleged "political" and "economic" animus, the Court noted:

> We are unpersuaded. In the first place, it is a close question whether Section 1985(3) was intended to reach any class based animus other than animus against Negroes and those who championed their cause, most notably Republicans. The central theme of the bill's proponents was that the Klan and others were forcibly resisting efforts to emancipate Negroes and give them equal access to political power. The predominate purpose of Section 1985(3) was to combat the prevalent animus against Negroes and their supporters.

Griffin, in applying the Right to Interstate Travel to the context of Section 1985(3), dealt directly with violent, purposeful racial animus. No such animus exists in fact or analogously in this case. Indeed, the intent of Petitioners' sit-in demonstrations is the emancipation of human life.

Respondents argue that "it is enough that out-of-state travel is impeded" for a violation to be established. *Id.* at 15. However, obstruction of an individual *traveller* does not equate with obstruction of interstate *travel*. It is a classic non sequitur to hold, as the lower courts have here, that a person who is *hindered in mere physical movement* from point A (sidewalk) to point B (abortion facility) somewhere within these United States has been denied a constitutional Right to Interstate Travel. The actions of Petitioners in no wise hindered *travel* under any reasonable, coherent, constitutionally acceptable definition of that term.

Further, there can be no doubt that the Petitioners did not have the requisite intent to impede interstate travel or oppress individuals from exercising that right. They were in no way concerned from where those seeking access to the abortion clinic travelled. It was irrelevant for their purposes.[11] Thus, to prevail, Respondents would have this Court expand the Right to Interstate Travel far beyond any existing standard and to hold that the mere obstruction of a building by private individuals, undertaken for the purpose of protesting and persuading others not to perform (in the case of a physician) or undergo (in the

[11] It is clear that Petitioners' sole purpose is to protest abortion. There is no primary intent to interfere with anyone's passage between or through territories.

case of a pregnant woman) a medical procedure, violates the Right to Interstate Travel.

The implications of such a holding are potentially staggering. It would transform the Constitution into a sword that reaches out and strikes conduct that has heretofore been governed by state tort and criminal trespass law. Such an unduly broad reading of the Right to Interstate Travel surely finds no place in the Constitution. In analyzing Petitioners' sit-in demonstrations, Judge Tashima has commented: "Whatever other legal rights and liabilities may be implicated by such conduct, there is no federal privilege or immunity of one class of persons not to have another class of persons engage in non-violent, civil disobedience."[12]

In sum, the Right to Interstate Travel at issue here does not concern the wisdom of the Court's prior abortion decisions, nor does it involve questions of the freedom of protestors to picket. The heart of the matter is the unwarranted enlargement of constitutional protections. As the Court stated in an analogous context, "The earnestness of this Court's commitment to racial justice is not to be measured by its willingness to expand constitutional provisions designed for other purposes beyond their proper bounds." *Holland v. Illinois*, ___U.S.___,110 S.Ct. 803, 811 (1990). Similarly, rejection of the lower courts' findings of a violation of the Right to Interstate Travel, under these facts, is not an erosion of either the existing right to abortion, or of the freedom from denial of any other civil right, but rather the recognition of the proper bounds of a well-established constitutional doctrine.

The contention that non-violent sit-in demonstrations involving hundreds of volunteers of conscience, gathering to protest abortion, rises to a purposeful constitutional violation of the Right to Interstate Travel, is nothing short of constitutional fiction – legal ambrosia – the quest for a federal cause of action where none exists. The application of the Ku Klux Klan Act via the Right to Interstate Travel against the Petitioners' sit-in demonstrations is an unprincipled legal fiction of technical form and only serves to keep the federal courts embroiled in

[12] *National Abortion Federation v. Operation Rescue*, No. CV 89-1181 (AWT) *slip. op.*, at 7 (C.D. Cal. January 31, 1990)(dismissing amended complaint with prejudice), *appeal pending*, No. 90-55199 (9th Cir. argued May 11, 1990).

abortion litigation in the post-*Webster*[13] era in a manner that was not intended by Congress.

II. The Right to Interstate Travel is a wholly insubstantial federal claim depriving the district court of subject matter jurisdiction.

Respondent's complaint in the district court sought a permanent injunction on four separate grounds — three state law claims (nuisance, trespass, tortious interference with business relationship) and one federal law claim (violation of Section 1985(3)).

In its attorneys' fees opinion, the district court noted that it "was, essentially, a simple trespass case. . . " Petition for Writ of Certiorari Appendix at 46a. The district court granted Respondents relief on three of their claims but denied relief on the tortious interference claim. On appeal, Petitioners contested the propriety of the district court's exercise of pendent jurisdiction over Respondents' state law claims, but in light of its affirmative holding on the federal claim, the court of appeals did not address this point of error. Petition for Writ of Certiorari Appendix at 9a.

Petitioners have renewed their attack on the district court's subject matter jurisdiction in this Court. *See* Question 4 of Petition for Writ of Certiorari. To date, Respondents' argument in support of the district court's subject matter jurisdiction, which allows it to exercise pendent jurisdiction, has consisted of little more than the fact that at least one other federal appeals court has upheld federal claims identical to those asserted here. *New York State N.O.W. v. Terry*, 886 F.2d 1339 (2d Cir. 1989), *cert. denied*, __ U.S. __, 110 S.Ct. 2206 (1990). *See also Roe v. Operation Rescue*, 919 F.2d 857 (3d Cir. 1990) (curiously upholding exercise of pendent jurisdiction over unappealed state law claims without ruling on the sole and identical federal claim under Section 1985(3)).

The standard for pendent jurisdiction is set forth by this Court in *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966). *Gibbs* held that federal courts may choose to assume pendent jurisdiction over state law claims only if the federal claim is substantial enough to confer subject matter jurisdiction.

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[13] *Webster v. Reproductive Health Services*, 492 U.S. 490, 109 S. Ct. 3040 (1989).

The Court has since refined this definition by holding that the test is whether the right claimed is "so insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise completely devoid of merit as not to involve a federal controversy." *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 70-71 (1978) (quoting *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 666 (1974)). *See also Hagans v. Lavine*, 415 U.S. 528, 542-43 (1974).

Respondents' argument as to the substantiality of their federal claim appears to rely solely upon the premise that if a particular federal claim has been upheld by a federal judge, then any other similar federal claims are *a fortiori* substantial. Such a result would hopelessly clog the federal courts with essentially state law claims. All that would be required is for one federal district court judge somewhere in the United States to uphold a federal claim — though the case revolved essentially around significant pendent state law claims. Plaintiffs all over the country would then be free to file similar actions in their respective federal district courts until the initial decision is overturned on appeal, either by this Court or a court of appeals. Given the rapidity with which "copycat" litigation is filed and the often slow pace of appellate review necessitated by overburdened dockets, it is not unrealistic to imagine that dozens of such cases could be filed if the standard Respondents propose prevails. *See* Petition for Writ of Certiorari at 13 n.4.

Quite properly, therefore, the federal courts of appeals have declined to enter the hard and fast rule that Respondents apparently seek and have instead made their own determination of a federal claim's substantiality. In a case strikingly similar to the one at bar, the United States Court of Appeals for the Seventh Circuit reversed injunctions issued by three district court judges under the Social Security Act and pendent state law grounds. The Seventh Circuit held that the relief granted under federal law should be reversed given its recent decision in another case, and that the federal claims were not substantial enough to have allowed the lower courts to properly exercise pendent jurisdiction over the state law claims. *Americana Healthcare Corp. v. Schweiker*, 688 F.2d 1072, 1081, 1087 (7th Cir.), *cert. denied*, 459 U.S. 1202 (1982). The court of appeals reached this conclusion notwithstanding the fact that the precedent it relied upon, *Northlake Community Hospital v. United*

States, 654 F.2d 1234, 1239 & n.6 (7th Cir. 1981), was not in accord with the holdings of other circuits.

Similarly, other courts of appeals have held a federal claim too insubstantial to support the exercise of pendent jurisdiction notwithstanding the fact that the district court had found the claim not only to be substantial but had upheld relief under the federal claim. For example, in *Town of West Hartford v. Operation Rescue*, 915 F.2d 92 (2d Cir. 1990), the Second Circuit held that a federal RICO claim was insubstantial notwithstanding the dissent of one member of the panel and the fact that the district court had found federal jurisdiction properly invoked and had granted a preliminary injunction on state law grounds. *Id.* at 104. There, the court of appeals harshly rejected the frivolous application of the federal anti-racketeering laws (18 U.S.C. Section 1961, *et seq.*) to Operation Rescue sit-in demonstrations at abortion facilities.

The Town of West Hartford had alleged that the demonstrations were predicate acts within the purview of the Hobbs Act (18 U.S.C. Section 1951) prohibiting criminal extortion. The court stated: "This theory is . . . untenable. . . . So bizarre a construction of the Hobbs Act affronts common sense, much less the rule of lenity." *Id.* at 102. The court of appeals also refused to apply civil RICO in an overly expansive manner as "civil RICO liability does not extend to deterring any illegal act . . . for which there are state and common law remedies." *Id.* at 104 (citations omitted). The court would not "countenance fanciful invocations of the draconian RICO weapon in civil litigation." *Id.*

The Respondents' Right to Interstate Travel claim is no less fanciful or unnecessary given the district court's admission that the claim was "essentially a simple trespass action" which has ample redress in the state courts. This Court must not allow wrongful interpretation of the Right to Travel to transform Section 1985(3) into the "general federal tort law" warned against in *Scott*, 463 U.S. at 834. *See also Bolden v. Alston*, 810 F.2d 353, 358 (2d Cir.), *cert. denied*, 484 U.S. 896 (1987) (reversing district court finding in favor of plaintiffs on federal claim and dismissing pendent state law claims because federal claim was insubstantial); *Lechtner v. Brownyard*, 679 F.2d 322 (3d Cir. 1982) (reversing jury verdict on federal and state

law claims because federal claim should have been dismissed by the district judge and was too insubstantial to support pendent state law claims).[14]

Judged then on its own merits, without the presumption of validity that Respondents so eagerly seek, Respondents' federal claim based on the Right to Interstate Travel is not substantial and could not confer authority upon the district court to exercise pendent jurisdiction over Respondents' state law claims.

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[14] Even if this Court were to find Respondents' federal claim sufficient for the discretionary exercise of pendent jurisdiction, it should remand the case to the court of appeals so that it may decide Petitioners' claim that the district court abused its discretion in exercising pendent jurisdiction over the state law claims. *See Ridenour v. Andrews Federal Credit Union*, 897 F.2d 715, 7122-23 (4th Cir. 1990) (where federal claim, which was substantial enough to invoke federal jurisdiction, is dismissed on its merits, district court should likewise exercise discretion to dismiss pendent state law claims absent "unusual circumstances").

CONCLUSION

The sole federal claim of the Respondents, 42 U.S.C. Section 1985(3), rises and falls entirely upon this Court's construction of the constitutional Right to Interstate Travel. The bizarre and fanciful nature of Respondents' Right to Travel claim is manifest after careful scrutiny divorced from the vicissitudes of the abortion issue. Being insubstantial in a jurisdictional sense, this Court should reverse the court of appeals and send the Respondents' claims into state court where they properly belong.

Respectfully submitted,

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